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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/622,115	07/18/2003	Michel John Arthur Groux	88265-6859	1635
29157	7590	06/25/2007		
BELL, BOYD & LLOYD LLP P.O. Box 1135 CHICAGO, IL 60690			EXAMINER CHAWLA, JYOTI	
			ART UNIT 1761	PAPER NUMBER
			NOTIFICATION DATE 06/25/2007	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATENTS@BELLBOYD.COM

Office Action Summary	Application No. 10/622,115	Applicant(s) GROUX ET AL.	
	Examiner Jyoti Chawla	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 3/07/2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on March 7, 2007 has been entered. Claims 2, 8, 11 and 12 have been amended, claims 14-16 have been cancelled and claims 2, 5-13 are pending and examined in the application.

Specification

Modification of the specification submitted Feb 6, 2007 has been entered.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-17 rejected under 35 U.S.C. 112, first paragraph, for the recitation of "wherein the milk product is high temperature processed and is room temperature stable" because the specification, while being enabling for "room temperature stable" (Original disclosure, page 2, line33), does not reasonably provide enablement for "milk product is high temperature processed". The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the invention commensurate in scope with these claims.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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Claims 1, 3-17 rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1 and 12 are indefinite for the recitation of "high temperature processing" of the milk product. It is unclear whether the high temperature is applied to the milk product at one specific step or the entire process of making the milk based foamed product is carried out at a high temperature. Clarification and /or correction is required.

The term "high temperature" in claim 1 and 12 is a relative term which renders the claim indefinite. The term "high temperature" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to what standard of temperature is being employed to determine whether the temperature is high or low. Clarification and or correction is required.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 5, 8, 10 and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Jonas (US 4,012,533).

Regarding claims 1 and 8, Jonas teaches of a milk product comprising 0-15% fat, 3-10% protein (non-fat solids), which includes non-fat dry milk (Column 5, lines 17-25, Column 5, lines 59-61), at least two emulsifiers (Column 6, lines 30-33), a stabilizer and water as instantly claimed. Jonas discloses emulsifiers including propylene glycol monostearate, mono and diglycerides, etc (Column 4, lines 22-34). Suitable stabilizers

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include alginates, carboxymethylcellulose, etc (Column 5 lines 2-6). Sodium alginate is utilized in a whipped dessert as a stabilizer (Column 9 lines 45-46) as instantly claimed. Jonas teaches that the milk product does not exhibit syneresis or foam breakdown upon holding at room temperature for as long as 6 to 8 hours and exhibits the physical and organoleptic properties of whipped topping (Column 2, lines 60-65). Jonas teaches a pasteurizing step in making the milk product (Column 11 line 40), i.e., heat treatment during production as instantly claimed.

Regarding claim 5 and 8, Jonas teaches of suitable emulsifiers including propylene glycol monostearate (Column 4 lines 22-34) that can be utilized at a range of 0.3 to 0.7% (Column 3 lines 40-45) as instantly claimed.

Regarding claim 10, Jonas teaches of non-dairy fat such as vegetable oils including soybean oil, palm oil, etc (Column 4 lines 1-5).

Regarding claim 11, Jonas teaches of additional ingredients in the milk product including flavorings, coloring agents, etc (Column 7 lines 36-38) as instantly claimed.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

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Determining the scope and contents of the prior art.

Ascertaining the differences between the prior art and the claims at issue.

Resolving the level of ordinary skill in the pertinent art.

Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

(A) Claims 3-4, 6-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas in view of Gonsalves et al (U.S. 6,033,711).

Jonas has been applied to claims 1, 5, 8 and 10 and 11 above.

Regarding claim 3, Jonas teaches of stabilizers as sodium alginate and carboxymethyl cellulose (CMC) in a whipped dessert in the amount of 0.26% which falls within the range recited by the applicant. Jonas, however, does not teach foam stabilizers comprising a mixture of microcrystalline cellulose and carboxymethylcellulose.

However, Gonsalves et al teach a whipped product comprising 0.1 to 0.5% of gum stabilizers including microcrystalline cellulose and carboxymethylcellulose, alginates and mixtures thereof in order to provide structure to the foam (Column 3 lines 8-15) as instantly claimed. Thus stabilizers in the recited range of the applicant were known to be added to whippable or whipped compositions (Jonas and Gonsalves). Also the mixture of stabilizers including microcrystalline cellulose and carboxymethylcellulose was also known in the art (Gonsalves). Therefore, it would have been obvious to one of ordinary skill in the art to modify Jonas and utilize a mixture of microcrystalline cellulose and carboxymethylcellulose as taught by Gonsalves in order to get a combination of

stabilizers that works well together to provide sustainable structure to the foam of the milk product, i.e., in order to provide a more stable foam.

Regarding claim 4, Jonas teaches of sodium alginate as stabilizer along with CMC, where the total amount of both stabilizers is 0.26% (Column 9, lines 45-46). The reference further teaches of sodium alginate in the amount of 0.1 % in a modified emulsion of example IV (Column 14, lines 1-10) which is included in applicant's recited range. Thus Jonas teaches of varying the amount of various stabilizers in the type of composition taught. Further, Gonsalves teaches that alginates are suitable stabilizers for whipped toppings. Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the amount of sodium alginate as taught by Jonas in order to adjust the total amount of stabilizer in the whipped composition. One would have been further motivated to do so in order to effective amount of stabilizer to make a softer whipped topping without making the topping either too stiff or peaky or too soft.

Regarding claim 6, Jonas failed to disclose sorbitan tristearate as an emulsifier in a milk product. However, Gonsalves teaches of sorbitan tristearate at a range from 0.03 to 0.19% (Column 2 lines 52-53) in a milk product such as whipped topping. The reference also teaches that sorbitan tristearate is preferred in a milk product such as whipped topping because Sorbitan Tristearate acts as a fat crystal modifier in compound coatings and prevents crystal transformation and subsequent sandiness in spreads. Therefore, it would have been obvious to one of ordinary skill in the art to modify Jonas based on the teachings of Gonsalves by utilizing sorbitan tristearate as an emulsifier in order to provide a stable product with no fat crystal formation in the whipped composition.

Regarding claim 7, Jonas does not teach the wt% for unsaturated monoglyceride. However, Gonsalves teaches an emulsifier level of 0.1 to 0.5%. The emulsifying agents include monoglycerides of fatty acids (Column 2 lines 38-41). This range is within applicant's recited range. It would be obvious to one of ordinary skill in the art to modify Jonas in view of Gonsalves and specify the amount of monoglyceride utilized in the whipped composition in order to make a consistently stable product.

(B) Claims 9 and 12-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas in view of Gonsalves further in view of Lynch (U.S. 5,759,609).

Jonas has been applied to claims 1, 5, 8 and 10 and 11 above. And Jonas in view of Gonsalves has been applied to claims 3-4 and 6-7 above.

Regarding claim 9, Jonas discloses a milk product comprising 14-32% fat (Column 6 line 53) and sodium alginate (Column 9 line 46). However, Jonas failed to disclose 2.4% to 3% propylene glycol monostearate and 0.1% to 0.15% unsaturated monoglycerides. Gonsalves teaches an emulsifier level of 0.1 to 0.5%. The emulsifying agents include monoglycerides of fatty acids (Column 2 lines 38-41) as instantly claimed.

Lynch teaches a milk product comprising emulsifiers in the range of 0.05% to 5% (Column 4 lines 64-67). Suitable emulsifiers as taught by Lynch include propylene glycol monostearate (Column 5 lines 12-13), which encompasses applicant's recited range. Thus whipped toppings with instantly claimed emulsifiers, in the range recited, were known in the art at the time of the invention (Jonas, Gonsalves and Lynch). It would have been obvious to one of ordinary skill in the art to modify Jonas further based on the teachings from Lynch and Gonsalves and incorporate unsaturated monoglycerides and propylene glycol monostearate as emulsifiers, in order to provide a milk based whipped product that produces a stable foam when added to foods.

Regarding claims 12 and 14, Jonas discloses a method of forming a milk product comprising forming an emulsion containing sodium alginate as recited in claim 14, skim milk, carboxymethylcellulose, adding cream cheese in water (Column 11 lines 27-45). However, Jonas did not show adding sorbitan tristearate. Gonsalves teaches suitable emulsifiers including sorbitan tristearate that can be utilized in a milk product. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Jonas and substitute any of the disclosed emulsifiers as taught by Gonsalves, in order to achieve a more stable foaming milk based product, as instantly claimed.

Further, The claims call for the presence of emulsifier. Emulsifiers and stabilizers are well known. The addition of same is not seen as a patentable distinction but merely an

ingredient incorporated for its own art recognized contribution of composition, for example, emulsifying fat in the composition and producing a stable foam. It would have been obvious to one having ordinary skill in the art at the time of the invention to have incorporated such ingredients as a matter of preference depending on, for example, availability, cost, desirable stiffness in the foam. New recipes for food involving the addition of common ingredients do not amount to invention merely because the coaction or cooperative relationship between the ingredients which produces new, unexpected, and useful function. In re Levin, 84 USPQ 232.

Regarding claim 13, Jonas teaches a pasteurizing step in making the milk product (Column 11 line 40) as instantly claimed.

(C) Claims 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jonas in view of Gonsalves further in view of the combination of Lynch (U.S. 5,759,609) and Thompson (U.S. 3,230,091).

Jonas has been applied to claims 1, 5, 8 and 10 and 11 above. And Jonas in view of Gonsalves has been applied to claims 3-4 and 6-7 above.

Regarding claims 15-17, Jonas teaches that the milk product does not exhibit syneresis or foam breakdown upon holding at room temperature for as long as 6 to 8 hours and exhibits the physical and organoleptic properties of whipped topping (Column 2 lines 60-65). However, Jonas does not teach utilizing a foaming device. Thompson teaches milk products dispensed using aerosol cans in order to form smooth, shiny, foamy, etc milk products when dispensed (Column 1 lines 43-45, Column 2 lines 48-50). It is well known in the art to utilize aerosol cans to dispense milk products to form foams and it would have been obvious to one of ordinary skill in the art at the time of the invention to utilize the foaming device as taught by Thompson in order to dispense a foamy milk product as instantly claimed.

Response to Arguments

Applicant's arguments filed February 6, 2007 have been fully considered but they are moot in view of the new ground(s) of rejection.

Applicant argues that the references fail to show the claimed invention. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicant's argument that Jonas failed to disclose every element of the present claims such as Jonas does not disclose the specific use of the whipped composition as foamed topping for beverages (Remarks, page 7), the applicant is referred to the reference where Jonas teaches that the whipped topping disclosed maybe used for various foods, besides whipped toppings are well known in the beverage industry with beverages such as hot chocolates. In addition, Jonas discloses similar components at the weight ranges instantly claimed; it would be obvious to one of ordinary skill in the art at the time of the invention that the composition as taught by Jonas would function as a beverage foaming milk product as claimed.

Conclusion

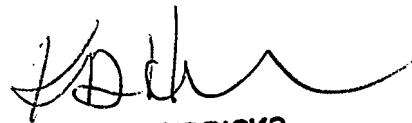
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Jyoti Chawla
Examiner
Art Unit 1761



KEITH HENDRICKS
PRIMARY EXAMINER